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CHARLES ELMORE CR

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 192[illegible].

No. [illegible] 113

THE CHESAPEAKE & OHIO RAILWAY COMPANY, PETITIONER,

v.

BRYANT, R. L., ADMINISTRATOR OF M. L. BRYANT, DECEASED, RESPONDENT.

BRIEF FOR RESPONDENT OPPOSING WRIT OF CERTIORARI.

CHARLES CURRY,
For Respondent.

R. B. STEPHENSON,
CURRY CARTER,
Of Counsel.

(34,243)

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1928.

No. 934

THE CHESAPEAKE & OHIO RAILWAY COMPANY, PETITIONER,

v.

BRYANT, R. L., ADMINISTRATOR OF M. L. BRYANT, DECEASED, RESPONDENT.

BRIEF FOR RESPONDENT OPPOSING WRIT OF CERTIORARI.

I.

Is Not the Petition Founded Solely on Questions of Fact Finally Settled by the Decision of the State Court?

According to our view, after the admissions that we make, the only question for the Court to consider is, was Bryant in the employment of the petitioner when

he was shot by petitioner's section foreman, Dodson? The admissions we have always made in this case are stated in the opinion by Judge Burks (R. 165), as follows:

> "It is admitted by the plaintiff's counsel that, at the time of the shooting, the defendant and Dodson were engaged in interstate commerce; that the intestate was also engaged as a laborer for the defendant *up to the time of his discharge;* that the Federal Employers' Liability Act applies to employees so engaged and is the exclusive law applicable to employees so engaged; and that said act is applicable only to negligent acts by which such employees are injured, and does not apply to wilful injuries. *Whether or not the Federal Act, therefore, is applicable is dependent on whether Bryant was an employee of the defendant on Monday, August* 31, 1925, *the day of the shooting.*" (Italics supplied.)

If Bryant was still in the service of petitioner at the time he was shot, the Federal Employers' Liability Act applies, and the writ prayed for should be granted, but if he was not in such employment, then the case comes under the Virginia statutes, and the writ should be denied. The question, therefore, to determine is simply a question of fact, and we submit that the decision of the highest State Court on the question of the employment of Bryant is final.

It has been held by this Court in a long line of decisions that the findings of fact by a State Court are conclusive upon this Court. *Dower* v. *Richards,* 151

U. S. 658; *Bartlett* v. *Lockwood*, 160 U. S. 357; *Hedrick* v. *Atchison, T. & S. F. Ry. Co.*, 167 U. S. 673; *Keckuk & H. Bridge Co.* v. *Illinois*, 175 U. S. 626; *Gardner* v. *Bonestell*, 180 U. S. 362; *Western U. Tel Co.* v. *Call Pub. Co.*, 181 U. S. 92; *Jenkins* v. *Neff*, 186 U. S. 230; *Adams* v. *Church*, 193 U. S. 510; *Hill* v. *McCord*, 195 U. S. 395; *Chrisman* v. *Miller*, 197 U. S. 313; *Gulf, C. & S. F. R. Co.* v. *Texas*, 204 U. S. 403; *Chapman & D. Land Co.* v. *Bigelow*, 206 U. S. 41; *Waters Pierce Oil Co.* v. *Texas*, 212 U. S. 86; *Thomas* v. *Texas*, 212 U. S. 278; *Rankin* v. *Emigh*, 218 U. S. 27; *Miedreich* v. *Lauenstein*, 232 U. S. 236; *Ætna L. Ins. Co.* v. *Dunken*, 266 U. S. 389.

It is true there are exceptions to this general rule, but it is not pretended or claimed by petitioner that the instant case comes under either of them. This Court stated the general rule and the exceptions in the case of *Ætna L. Ins. Co.* v. *Dunken*, 266 U. S. 389, 394, *supra*, as follows:

> "The rule is settled that the decision of a state court upon a question of fact ordinarily cannot be made the subject of an inquiry here. See, for example, Missouri, K. & T. R. Co. *v.* Haber, 169 U. S. 613, 639, 42 L. ed. 878, 887, 18 Sup. Ct. Rep. 488; Smiley *v.* Kansas, 196 U. S. 447, 453, 454, 49 L. ed. 546, 550, 25 Sup. Ct. Rep. 289. To this general rule there are two equally well-settled exceptions: "(1) Where a Federal right has been denied as the result of a finding shown by the record to be without evidence to support it, and (2) where a conclusion of law as to a Federal right and findings of fact are so

> intermingled as to make it necessary, in order to pass upon the Federal question, to analyze the facts." Northern P. R. Co. *v.* North Dakota, 236 U. S. 585, 593, 59 L. ed. 735, 740, L. R. A. 1917F, 1148, P. U. R. 1915C, 277, 35 Sup. Ct. Rep. 429, Ann. Cas. 1916A, 1, and cases cited. See also Truax *v.* Corrigan, 257 U. S. 312, 324, 325, 66 L. ed. 254, 259, 260, 27 A. L. R. 375, 42 Sup. Ct. Rep. 124."

It will be seen that it is obvious that neither of these exceptions applies to this case, and this Court has no jurisdiction to review the evidence upon a *pure* question of fact, although a Federal question would or would not be presented according to the way in which the question of fact might be decided. *Dower* v. *Richards,* 151 U. S. 658. Nor is the general rule as to the finding of fact affected, although the finding of an inferior State Court was affirmed by a divided State Court. As said by this Court in the case of *Minneapolis & St. L. R. Co.* v. *Minnesota, ex rel. Railroad & Warehouse Commission,* 193 U. S. 53:

> "It is well established that on error to a state court this court cannot re-examine the evidence, and when the facts are found we are concluded by such finding. Egan *v.* Hart, 165 U. S. 188, 41 L. ed. 680, 17 Sup. Ct. Rep. 300. But in the case at bar we are met by the circumstance that the supreme Court equally divided on the question whether the facts distinguish this case from 76 Minn. The plaintiff in error, therefore, contends that there has been no judgment of the supreme court on the facts, and they are open to review here. The contention is not tenable.

> There is no statement of facts by the supreme court, and its decision, though by a divided court, constituted an affirmance of the finding of the district Court. * * * The finding, like the verdict of a jury, is conclusive in this court. Dower *v.* Richards, 151 U. S. 658, 38 L. ed. 305, 14 Sup. Ct. Rep. 452."

Judge Burks, after reviewing the evidence on the question of whether Bryant was still in petitioner's employment when the tragedy complained of happened, said, in passing on the question whether the Federal statute applies (R. 165-6):

> "Bryant was employed by the day, and either party had the right to terminate the service at will, without notice. Dodson, it is clear from the testimony, had the right to discharge him, and, independent of any other evidence in the case, *Dodson testified that he discharged him on the previous Saturday. On a demurrer to the evidence, this fact must be accepted as established.* It is unnecessary, therefore, to make any further reference to the able argument of counsel and the cases cited by them, on the questions above mentioned. Counsel agree, except as to the time of the discharge, *and this is concluded, on a demurrer to the evidence, by the testimony of Dodson.* There are no conflicts of evidence on a demurrer to the evidence. The concessions made by the demurrer eliminate the conflicts. *Bryant was not an employee of the company at the time of the shooting.* The case, therefore, is controlled by the State statute." (Italics supplied.)

There is not a scintilla of evidence in the record that Bryant was not discharged on Saturday, two days before the shooting, and the pretension here that Bryant was shot immediately after he was discharged is without any foundation whatever in fact. Mr. L. E. Crance, Supervisor of Tracks (R. 137), called as a witness for petitioner, said in chief (R. 141):

> "I said (to Dodson) tell him (Bryant) to leave and draw his money, I don't want him any longer if he don't want to work."
>
> Q. "That was on Saturday afternoon?"
>
> A. "Yes sir."

The first question propounded to Mr. Crance on cross-examination (R. 141) was:

> Q. "You in fact discharged him yourself, or directed his discharge?
>
> A. "Yes sir, I directed it."

In any view of the case that can be taken, it was a fact to be determined by the jury or the Court on a demurrer to the evidence, whether or not Bryant was in the employment of petitioner in interstate commerce when he was shot.

As in the instant case, the sole question at issue in *Pennsylvania Co.* v. *Marion Donot*, 239 U. S. 49, was whether or not the plaintiff, Donot, at the time he was injured, was engaged in interstate commerce. The trial Court refused a request to charge that the plaintiff was not engaged in interstate commerce when the accident occurred, and therefore could not recover.

That question was referred to the jury to determine, which found for the plaintiff, and judgment was entered on the verdict. The trial Court was sustained by the Circuit Court of Appeals, and when the case had been brought to this Court on writ of error, there was a motion under Rule 6, section 5, to affirm the judgment. In sustaining the motion to affirm, this Court said:

> "The question presented upon this writ of error is 'so frivolous as not to need further argument', and the motion to affirm the judgment below must be granted (Rule 6, Sec. 5)."

and the Court, in concluding the opinion, said:

> "The trial court submitted to the jury for determination whether he (the plaintiff) was engaged in interstate commerce at the time of the injury, and in approving such action (224 Fed. 1021) the Circuit Court of Appeals was clearly right."

Petitioner has assigned other grounds for the writ of certiorari, but they are clearly subsidiary and dependent upon the question whether or not Bryant was in the employment of petitioner in interstate commerce at the time of the fatal shooting, and, as said by this Court in *Erie R. R. Co.* v. *Solomon,* 237 U. S. 427:

> "As a proposition which is unsubstantial and frivolous cannot be made substantial by asserting another proposition of the same character, it results that there is no ground for the exer-

cise of jurisdiction, and the writ of error is therefore dismissed for want of jurisdiction."

Does it not appear that there is no reasonable ground for granting the prayer of the petition, and that respondent is entitled to damages for his delay, and to single or double costs, as provided for in section 237 of the Judicial Code?

We hardly deem it necessary to say more, but, as Lord Coke said, "abundans cautela non nocet".

II.

The Theory That Bryant's Employment Continued a Reasonable Time After His Discharge.

It is admitted by petitioner that Bryant had been discharged from its service before he was shot, but it is claimed and pretended that the discharge was closely followed by the shooting, and before Bryant had been given a reasonable time to leave petitioner's work and premises, and that in contemplation of the Federal statute, the employment of Bryant in interstate commerce continued to so exist until that reasonable time had elapsed. *This is, as we view the application, the only real ground upon which the application for a writ of certiorari is founded.* Petitioner, however, ignores altogether the admitted fact on the demurrer to the evidence that Bryant had been discharged on Saturday before the Monday on which the shooting occurred.

The question as to whether a servant, whose job of work had ended, was still in the employment of his

master until he had had time and opportunity to safely leave the employment, so as to bring the case under the fellow-servant doctrine, was held by this Court to be a question of fact for the jury in the case of *The Northwestern Union Packet Co.* v. *McCue's Admrx.*, 84 U. S. 508. The Court said in that case:

> "The case is substantially this: Patrick McCue was a common laboring man living in Prairie du Chien, Wisconsin, and employed in the railroad warehouse in that place. On the evening of the 11th of July, 1868, the steamer, War Eagle, owned by the plaintiff in error, arrived at the landing in Prairie du Chien, for the purpose of taking freight from the warehouse. Being short of hands, the officers of the boat employed McCue and four or five other persons to assist in carrying freight from the warehouse and putting it on board the boat. This employment was continued about two hours and a half, at the end of which time McCue and the rest were requested to go to the office of the boat and receive their pay. They proceeded there accordingly, were paid, and then started to go ashore. The men on board the boat pulled in the gang plank while McCue was on it, who was thus thrown down and injured, from which injury he died.
>
> "It is insisted on the part of the plaintiff in error that a master is not responsible to a servant for injuries caused by the negligence or misconduct of a fellow servant engaged in the same general business. Whether this general proposition be true or not it is not necessary to determine in the state of this record. It is conceded, if the employment of McCue by

the company terminated before the injury complained of was suffered, that the company is liable, and this the jury have found to be the fact.

"But it is said it was the province of the court, and not the jury, to determine the point of time at which the service was ended; that as the facts were undisputed, it was a question of law, and the court should have told the jury the relation of master and servant subsisted when the accident happened.

"We do not think so. One of the theories on which the suit was prosecuted was that McCue's special employment had ceased when he was injured. This theory was resisted by the defense, and the court, not taking upon itself to determine as an absolute proposition when the employment terminated, left it to the jury to find how the fact was. This ruling, in our opinion, was correct. It was for the jury to say, from the nature of the employment, the manner of engaging the hands, the usual mode of transacting such a business, and the other circumstances of the case, whether the service had or had not ceased at the time of the accident. The point was submitted fairly to the jury, with no more comments than the evidence justified. It was argued by the plaintiff in error that the employment of necessity terminated on the land, because it was there McCue was engaged to do the work, and he had a right to be provided with the proper means of reaching it from the boat. On the contrary, the defendant in error contended the special service ceased when McCue had finished his work and was paid off; that after this he was not subject to the control

> or direction of the officers of the boat, but at liberty to stay on the boat or go off as he pleased. The jury took this latter view of the relation of the parties, and we cannot say that they did not decide correctly. At any rate, their decision on a question of fact is not subject to review in this court. The defense at best was a narrow one, and in our opinion more technical than just."

A number of authorities have been cited by petitioner showing that a servant's employment extends to going to and leaving his work, but no authority has been cited or referred to that shows that the employment of a servant is extended for the benefit of the master after the servant has been discharged. The going to and leaving the work are necessary incidents of the servant's employment. This was implied in the contract of service. If, however, a servant while at work is discharged, the relation of master and servant terminates and ends, and the servant at once becomes a mere licensee to leave the master's premises, and if he refuses to leave when commanded, he at once becomes a trespasser.

Is it not apparent that the same principle cannot apply to a discharged servant, as in a case where a servant had completed his day's work, and as he was leaving his work or his master's service, was injured by the negligence of the master or his servant? The leaving of the master's premises by an employee, and the leaving of the master's premises by a discharged servant, obviously stand on very different principles—the one is founded on a contractual relation, but the

other has no such relation with his late master. Their relationship has been ended or extinguished—they have become strangers. Is it not a strained or fallacious view of petitioner that Bryant was still in its employment in interstate commerce after he had been discharged?

III.

Admissions of Petitioner in the Record That Bryant Had Been Discharged Two Days Before the Shooting.

The pretension of petitioner that the discharge and the shooting were almost simultaneous is altogether an after-thought. No such claim was made until after judgment had been rendered on the demurrer to the evidence by the trial court. Petitioner admitted in the fourth ground of its demurrer to the evidence (R. 160) *"That the plaintiff's intestate was discharged from the defendant's employment on Saturday, prior to the Monday of the shooting complained of, and not on said Monday,"* and in the seventh ground of its demurrer to the evidence (R. 161) admitted *"That the shooting of said intestate by said Dodson was entirely separate in point of time and occasion from said intestate's discharge from the defendant's employment, and was not done in the course of discharging intestate."*

This was a solemn admission in the pleading, for at common law and in Virginia a demurrer to the evidence is a pleading. Burks Pl. & Pr., 2nd Ed. 469. *Lynchburg Foundry Co.* v. *Dalton*, 121 Va. 480; *Chesa-*

peake & Ohio Ry. Co. v. *Sparrow*, 98 Va. 650; *Mandeville* v. *Perry*, 6 Call. 78 (Va.). It is true that these statements were made in the grounds of demurrer to the evidence, but under Sec. 6117 of the Code of Virginia, 1919, the grounds of demurrer are part of the demurrer, and the Court is without jurisdiction to consider such a demurrer unless the grounds are so stated. In *Saunders* v. *Southern Ry. Co.*, 117 Va. 396, the Virginia Court said, at p. 399:

> "The clear and explicit terms are that, in all suits or motions hereafter, the party tendering the demurrer to evidence shall state in writing specifically the grounds of demurrer relied on, and that no grounds of demurrer shall be considered unless they be thus specifically stated. These statutory provisions are mandatory and preclude the idea of jurisdiction to consider a demurrer to evidence, unless the grounds of such demurrer are specifically stated in writing."

Is not petitioner bound by admissions in its demurrer to the evidence? 2 Wig. on Ev., sec. 1063, 1064, 2nd Ed.

IV.

Petitioner's Theory That, Having Pleaded the Federal Statute, This Court Has Jurisdiction.

It is stated in the brief of petitioner's counsel, page 13, "that a controlling Federal question is necessarily involved, since the petitioner's pleadings refer to and rely upon the Federal Employers' Liability Act to de-

feat a recovery." Can it be claimed with any seriousness that the mere raising of a Federal question by a plea gives this Court jurisdiction? There must appear more than a bare assertion of reliance on the Federal statute or a Federal question in a pleading. *Millingar* v. *Hartupee*, 6 Wall. 258.

> "A real and not a fictitious Federal question is essential to the jurisdiction of this court over the judgment of a state court."
>
> *Hamblin* v. *Western Land Co.*, 147 U. S. 530.

If the contention of petitioner is correct, as stated in the Hamblin Case, *supra*, "a Federal question might be set up in almost any case and the jurisdiction of this Court invoked simply for the purpose of delay." It is well settled, as said by this Court in the case of *Sawyer* v. *Piper*, 189 U. S. 157, "that the mere averment of such a question is not sufficient."

V.

The Assertion in the Argument of Petitioner's Counsel, Brief, Page 13, That the Evidence Shows That Bryant was Discharged Just Before he was Shot.

Petitioner's counsel apparently with much earnestness urges that the discharge of Bryant and the shooting were almost simultaneous. On page 18 in the brief of counsel for petitioner it is stated "that the intestate was wounded by petitioner's foreman immediately after being discharged."

The record will be searched in vain for any evidence to establish this. Dodson, the petitioner's foreman, who shot Bryant, was called as a witness for respondent, and was asked (R. 84-5):

Q. "Do you know whether Bryant had been discharged from the C. & O. service when he was mortally wounded?"
A. "Yes sir."
Q. "When was he discharged?"
A. "He was discharged on Saturday."
Q. "On what day was the shooting?"
A. "On Monday morning."
Q. "On the following Monday morning?"
A. "Yes sir, the following Monday morning."
Q. "Who discharged him from the C. & O. service?"
A. "I did myself."
Q. "Did you have authority to do that?"
A. "Yes sir."

On Monday morning following the discharge, Bryant went back to offer himself for work. His regular foreman was petitioner's witness, E. C. Long, who said (R. 159) that Bryant was a good worker. Bryant no doubt was loath to leave the service, and went back after his discharge on Saturday reasonably hoping that Long might be in charge, and that he (Bryant) might be taken back on the section force. When he got to the tool-house, where the force was making ready to go to work, Dodson told Bryant that he had been discharged on Saturday, and that he could not work (R. 93). Bryant at first paid no attention to what

Dodson said, and Dodson repeatedly told him to leave, to get on up the road, and Bryant refused to leave at the point of a gun, and the shooting began.

On the demurrer to the evidence it is clearly an admitted fact by petitioner that Bryant was discharged on Saturday, and its Supervisor of Tracks, Mr. L. E. Crance, as we have pointed out *supra,* had directed Dodson to discharge Bryant on the Saturday before the shooting. In petitioner's demurrer to the evidence, as we have pointed out *supra,* it expressly admitted that Bryant had been discharged on Saturday, and there is no evidence whatever that shows or tends to show that Bryant was discharged on Monday morning, immediately before he was shot.

It is stated in the petition, page 4, that petitioner had objected to the testimony as to Bryant's being discharged on Saturday. It will be observed, however, that there was no bill of exception, or certificate of exception, taken by petitioner, nor was there a motion to strike out this evidence or any evidence, and petitioner afterwards introduced Mr. Crance and brought out the same evidence, with reference to the discharge on Saturday, that had been testified to by Dodson. It will be seen by reference to the case of *N. & W. Ry. Co.* v. *Warden,* 117 Va., 801, 804, cited by petitioner, that it has no application whatever in this case, and it will be further seen that no objection to the admissibility of evidence was ever relied on or made in this case, and was not referred to in the assignments of errors in petitioner's petition for a writ of error (R. 4). There were only two assignments of error made:

"First. The defendant cannot be held liable under the Federal Employers' Liability Act, which applies here to the exclusion of any other statute or rule of law since the intestate's injury and death did not result from the negligence of any of the defendant's officers, agents or employees."

"Second. Dodson, who shot the plaintiff's intestate, was not acting within the scope of his employment by the defendant, or in the prosecution of the defendant's work, in attacking and injuring the plaintiff's intestate."

No other error or errors were or could be relied on in the State court.

"A petition (for writ of error) is a pleading and must conform to the rules of pleading with respect to certainty and distinctness of allegation of errors relied on for reversal, otherwise they will not, as a rule, be considered."
Ewell v. *Brock,* 120 Va., 475, 480.
Burks Pl. & Pr., 2nd Ed., 770, 771.

VI.

Petitioner's Theory That There was No Evidence to Show That Dodson Had Authority to Expel Trespassers.

Whether Dodson had authority to expel trespassers on petitioner's property is immaterial as we take it here. That question, however, was a question of fact, and was settled by the State Court. The evidence of petitioner's own witness, Crance, shows that Dodson, or petitioner's foreman, had general authority over

petitioner's property. He said (R. 141) "the duties of a section foreman (among other duties stated) is to look after the company's property in general." We cannot see how petitioner can claim that the question as to whether Dodson had the right to eject a trespasser from petitioner's premises can in any way show or tend to show or raise a Federal question or a question under the Federal statute here relied on by petitioner.

VII.

The Claim That the Action of the Supreme Court of Appeals of Virginia Emphasizes the Propriety of a Review by This Court, Brief, Page 19.

There is nothing in the record that shows or tends to show that the Virginia Court had any doubt about the fact that the State statute applies in this case and not the Federal statute. The State Court could have no doubt about Bryant's having been discharged two days before he was shot. That was an admitted fact on the demurrer to the evidence, and petitioner made that admission in the record, as we have pointed out *supra*. If Bryant was discharged on Saturday before the Monday on which he was shot, the Federal statute could have no application.

The statute provides "that every common carrier by railroad while engaged in interstate commerce between any of the several states * * * shall be liable in damages to any person suffering injury while he is engaged by such carrier in such commerce, or, in case of the death of such employee, to his personal

representative * * * for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier * * *." 45 U. S. C. A., sec. 51, p. 92.

From the very terms of the statute two circumstances must necessarily concur for the application of this statute to the instant case:

First. The petitioner must have been a railroad engaged in interstate commerce at the time that its servant and section foreman, Dodson, shot and killed the deceased, Bryant; and

Second. Bryant must have been in the employment of petitioner in such commerce at the time of the fatal shooting.

This Court said in the case of *Pederson* v. *Delaware, etc., R. Co.* 229 U. S. 146, "considering the terms of the statute, there can be no doubt that a right of recovery thereunder arises only where the injury is suffered while the carrier is engaged in interstate commerce, and while the employee is employed by the carrier in such commerce."

It was said and held by this Court in the case of *North Carolina R. R. Co.* v. *Zachary,* 232 U. S. 248, 256:

> "In order to bring the case within the terms of the Federal Act, defendant must have been, at the time of the occurrence in question, engaged as a common carrier in interstate commerce, and plaintiff's intestate must have been employed by said carrier in such commerce."

It will be seen by reference to the opinion deli vered by Judge Burks that there can be no question about the Virginia statute applying. The Court could have had no doubt about this because the evidence sh owing that the State statute alone applies is so clear a nd so conclusive that any layman could see and kno w and understand that the Federal statute could not apply. The only difficulty that the State Court had was as to whether Dodson, within the scope of his auth ority, killed Bryant, and this is apparent from the o pinion of Judge Burks.

VIII.

Conclusion.

It is submitted, in conclusion, that Bryant w as not in the employment of petitioner in inter state com merce at the time he was shot; that the Federal statute has no application; that the State statute governs, an d that no Federal question is involved. We submit th at the writ of certiorari prayed for should be denied.

Respectfully submitted,

CHARLES CURRY,
For Respondent, R. L. Bryant,
Administrator of the Estate of
M. L. Bryant, Decea sed.

R. B. STEPHENSON,
CURRY CARTER,
Of Counsel.